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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROBERT TRENT JONES II, INC. and
ROBERT TRENT JONES LICENSING
GROUP, LLC

Plaintiffs,

v.

GFSI, INC. d/b/a GEAR FOR SPORTS,
INC.

Defendant.

Case No. 07-CV-04913-SC

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY
INJUNCTION

Date: January 25, 2008

Time: 10:00am

Judge: Samuel Conti

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INTRODUCTION

Plaintiffs demonstrated in their initial submission that they satisfy the requirements for a preliminary injunction under the standards in the Ninth Circuit. Defendant’s opposition does not seriously challenge Plaintiffs’ legal position or their interpretation of the License Agreement. Instead, Defendant’s opposition relies upon unsupported assertions that conflict with other evidence. This reply focuses on the following points: (1) Defendant sells damaged, defective or seconds bearing RTJ Marks; (2) Defendant sells apparel bearing RTJ Marks to discount stores; (3) Plaintiffs’ request for injunctive relief is not moot; (4) Plaintiffs need not furnish additional evidence; (5) Defendant adduced no competent evidence for the Court to consider; and (6) Defendant admits that it will suffer no harm upon entry of the preliminary injunction with the only exception being the limited economic impact from discontinuing sales to one particular customer, out of hundreds of RTJ apparel customers.

ARGUMENT

A. Defendant Sells Damaged, Defective or Seconds Bearing the RTJ Marks

The sale of damaged, defective or seconds bearing the RTJ Marks is a clear violation of the License Agreement. (Jones Ex. H). Having such damaged, defective or seconds bearing the RTJ Marks in the marketplace causes substantial irreparable harm to the valuable Robert Trent Jones name and mark. (Jones ¶ 30). While Defendant states it “does not sell damaged, defective or seconds bearing the RTJ Marks to any stores without first removing the identifying marks,” Plaintiffs’ research shows that this is not correct. (Graveel ¶ 20).

1. Defendant's Own Practices Support This Assertion

Defendant artfully stated that it “does not sell damaged, defective or seconds bearing the RTJ Marks to any stores.” (Graveel ¶ 20). However, employees for Defendant admitted that damaged, defective or seconds bearing RTJ Marks are stored in bins housing product

intended to be sold to “secondary markets.” (Burgett ¶ 16; Zetlmeisl ¶ 26). Defendant’s employees also stated that Defendant’s practice is to sell the product to “secondary markets” once sufficient bulk accumulated. (Zetlmeisl ¶ 27; Burgett ¶ 17). Mr. Zetlmeisl (Plaintiffs’ auditor) and Mr. Burgett (Plaintiffs’ attorney) conducted a financial review of Defendant during August 28th and 29th, as permitted under the License Agreement. (Zetlmeisl ¶ 2; Burgett ¶ 2). During this review, Messrs. Zetlmeisl & Burgett viewed damaged, defective or seconds bearing the RTJ Marks in these storage bins. (Zetlmeisl ¶ 26; Burgett ¶ 16). During this review, Messrs. Zetlmeisl & Burgett were informed that Defendant holds a weekly dock sale at its corporate headquarters (“Dock Sale”) open to the public and employees. (Supplemental Declaration of Thomas B. Zetlmeisl (“Zetlmeisl Supp.”) ¶ 5; Supplemental Declaration of Jay M. Burgett (“Burgett Supp.”) ¶ 4). At the Dock sale, Defendant sells RTJ branded product from these storage bins at discount prices. (Zetlmeisl ¶ 6; Burgett ¶ 5). Although Mr. Graveel’s declaration (“Graveel Dec.”) states that Defendant “does not sell damaged, defective or seconds bearing the RTJ marks to any stores without first removing the identifying marks,” during their visit to Defendant’s facilities, Messrs. Zetlmeisl & Burgett were told by Defendant’s representatives that they were not aware of any removal process. (Graveel ¶ 20; Burgett ¶ 19; Zetlmeisl ¶ 29). Defendant provides no further information regarding this removal process, such as, who removes the RTJ marks, when it takes place, how the marks are removed, where the “de-labeled” product is sold, etc. Defendant’s own practices do not support its claim that it does not sell damaged, defective or seconds bearing RTJ Marks.

2. On January 9, 2008, after the Graveel Declaration was Signed, Defendant Sold Damaged, Defective or Seconds Bearing the RTJ Marks

On January 9, 2008, Jimmy D. Kidd visited Defendant's Dock Sale to purchase apparel bearing the RTJ Marks. (Declaration of Jimmy D. Kidd ("Kidd") ¶ 3). While the Dock Sale on

1 this particular day, was supposed to be open to GFSI employees only, the GFSI employee
2 allowed Mr. Kidd into the Dock Sale to purchase apparel anyway. (*Id.* at ¶¶ 3-4). Mr. Kidd
3 then proceeded into the Dock Sale and purchased eleven shirts with RTJ Marks, at extremely
4 discounted prices. (*Id.* at ¶¶ 5-10, Ex. 1). Photographs of these shirts show the RTJ Marks and
5 quality defects, such as gross discoloration. (*Id.* at ¶ 11, Exs. 1-2). Another employee of
6 Defendant employee stated that when Dock Sale is open to the public, there is usually
7 additional RTJ apparel for sale. (*Id.* at ¶ 8). An additional review of these shirts indicates the
8 product to be defective, irregular, or seconds due to fabric discoloration. (Supplemental
9 Declaration of Mary K. Hadley (“Hadley Supp.”) ¶¶ 19-20, Ex. 19). Thus, Defendant sold
10 damaged, defective and second product bearing the RTJ Marks after Mr. Graveel executed his
11 declaration. Moreover, without a clear judicial decree there is nothing to prevent discount
12 sellers located near Defendant, such as Hockabees, from purchasing similar damaged, defective
13 or seconds bearing the RTJ Marks. (Hadley Ex. A).

15 **B. Defendant Sells to Discount Stores**

16 **1. The Golf Warehouse is a Discount Store, as Defendant Previously Admitted**

17 The Court, of course, need not find absolutely that The Golf Warehouse (“TGW”) is a
18 discount store, only that Plaintiffs have probable success on the merits of their claims and a
19 likelihood of irreparable injury, such injury being presumed in the trademark infringement
20 context. *Goto.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). The parties
21 agree that Defendant is currently selling to TGW, and Defendant intends to continue selling to
22 TGW in the future. Accordingly, the only issue is whether TGW is a discount store. However,
23 there can be little dispute on this issue, as Defendant’s own documents refer to TGW as a
24 discount store.
25

1 As stated in Plaintiffs' original brief, Defendant submitted a Marketing, Distribution,
 2 Financial and Quality Plan Outline ("Defendant's Marketing Plan") to RTJ2 in late June 2007.
 3 (Jones Supp. ¶ 5, Ex. C). Defendant's Marketing Plan states:

4 Below is a list of the top 10 accounts for RTJ Apparel sales in 2007. Three of the top ten are accounts
 5 which are considered discounters. The top account is Steinmart a discount retailer.

RTJ GOLF TOP 10 ACCOUNTS		FY 2007 YTD	Net Sales + Open	% To Total
Sales through 6-12-07				
Customer Number + Name				
20563, STEIN MART INCORPORATED GF		100,515	6%	Secondary Market Account
22263, THE GOLF WAREHOUSE LLC		72,588	4%	Secondary Market Account
2935, TOURNAMENT PLAYERS CLUB		65,602	4%	
22835, HAROLD STORES INC GO		58,199	4%	
21589, NEIMAN MARCUS GF		53,176	3%	Secondary Market Account
6151, KEMPER SPORTS MANAGEMENT INCORPORATED		43,826	3%	
384, TROON GOLF MANAGEMENT		42,776	3%	
3126, THE BOULDERS CLUB		31,527	2%	
1628, KAPALUA LAND COMPANY LTD		27,688	2%	
10364, SKIPPER'S HOOK MARINA		23,977	1%	
TOP 10 SUB TOTAL		519,873	32%	

11 (Id.) The Golf Warehouse, Defendant's second largest customer in FY 2007, is designated by
 12 Defendant as a "discounter" and "Secondary Market Account," just like Stein Mart
 13 (Defendant's top account), which Defendant admits is a discount seller. (Id.) Likewise, the
 14 TGW pricing data provided to Mr. Zetlmeisl reflects pricing similar to other discount stores.
 15 (Zetlmeisl ¶ 10). Now, six months later, Graveel signed a declaration stating "GFSI believes
 16 The Golf Warehouse is properly considered a Golf Specialty Store, not a 'discount' or
 17 'Secondary-Market' store." (Graveel ¶ 17.) TGW may specialize in golf-related products, but
 18 the fact remains that TGW is a discount store. Whether TGW is a "golf specialty" discount
 19 store is irrelevant.

21 In fact, TGW makes no bones about being a discount store. TGW characterizes itself
 22 as "being your **discount** retailer for golf equipment and apparel over the Internet." (Hadley ¶ 5,
 23 Ex. G, emphasis supplied). TGW's website describes the "TGW Low Price Guarantee"
 24 stating "Find a lower price and we will match it!" (Hadley Supp. ¶ 3, Ex. 1). TGW's
 25 description of its pricing indicates that it sells product below the suggested retail price ("SRP")

1 and the SRP serves “as a benchmark by which to compare [its] discounts from SRP.” (Hadley
 2 Supp. ¶ 4, Ex. 2).

3 Defendant’s reliance on a bankruptcy court’s decision in, *In re City Stores*, 9 B.R. 717,
 4 720 (B.R. S.D.N.Y. 1981), to create a six-factor definition for a “discount store” is nothing
 5 more than a rhetorical sleight-of-hand. Indeed, Defendant does not even bother to try and
 6 assess TGW in light of any of the six *City Stores* factors. This is probably because TGW’s own
 7 website and other material support the conclusion it is a discount store. In considering the *City*
 8 *Stores* factors, Plaintiffs submit: (1) TGW is not a conventional, brick and mortar, department
 9 store, like Sears, but an Internet golf retailer; (2) TGW characterizes itself as a “discount
 10 retailer;” (3) TGW’s low price match guarantee and price policy suggests that it sells
 11 substantially below the MSRP; (4) TGW focuses exclusively on the sale of golf equipment and
 12 apparel; (5) TGW targets discount Internet shoppers; and (6) its competitors are likely other
 13 Internet discount retailers, such as www.golfdiscount.com and www.rockbottomgolf.com.
 14 (Hadley Supp. ¶¶ 2-14, Exs.1-14). Therefore, the Court should accept TGW’s self-
 15 characterization as a discount store, and Defendant’s own admission that TGW is a
 16 “discounter” and “Secondary Market” seller, no different than Stein Mart.

17 2. **Defendant Fails to Deny that it is Selling to Discount Stores Generally, and**
 18 **Defendant Has Sold to Discount Stores Not Specifically Mentioned in**
 19 **Plaintiffs’ Motion**

20 Where a defendant claims to have ceased infringing conduct, it is under a heavy burden
 21 and must irrefutably demonstrate its reform. *Lyons P’ship L.P. v. Morris Costumes, Inc.*, 243
 22 F.3d 789, 800 (4th Cir. 2001) (affirming injunction where defendant failed to “make an
 23 affirmative showing that continuing infringement was, practically speaking, nearly
 24 impossible”); *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir. 1986)
 25 (quoting J. Thomas McCarthy, McCarthy on Trademarks § 30.11 4th ed. (2007)). Otherwise,
 “they would simply be free to ‘return to [their] old ways’ after the threat of a lawsuit has

1 passed.” *Lyons P’ship*, 243 F.3d at 800 (quoting *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S.
 2 67, 71-72 (1983)).

3 Here, there is no credible evidence supporting Defendant’s statement that it has ceased
 4 sales to discount stores. Defendant submits no sworn statement that it will not continue or
 5 resume sales to discount stores in the future. It merely claims (without evidence) to have
 6 ceased such sales to certain discount stores, not to discount stores in general. Instead,
 7 Plaintiffs’ evidence shows Defendant has continued to sell to discount stores over the past year,
 8 including its own discount store, as described below. The financial data supplied to Plaintiffs
 9 by Defendant is limited to sales through July 31, 2007, so it is uncertain what sales Defendant
 10 made beyond that date. (Zetlmeisl ¶ 18). Plaintiffs, of course, seek to enjoin Defendant from
 11 selling product bearing the RTJ Marks to discount stores in general (in accordance with the
 12 terms of the License Agreement). This motion is not about a few stores that the Defendant
 13 would focus on.

14 **i. Defendant Admitted a Recent Sale to Hockabees**

15 By its own admission, Defendant sold apparel with RTJ Marks to Hockabees at least as
 16 recent as late October 2007. (Graveel ¶ 16, Ex. A). Defendant claims such sales were
 17 inadvertent, but there is no reason for Plaintiffs to suffer the irreparable harm caused by
 18 Defendant’s “errors.” (*Id.*). Moreover, Hockabees continues to advertise for sale almost 50
 19 items of apparel bearing the RTJ Marks, including “brand new apparel.” (Hadley Supp. ¶¶ 15-
 20 21 16, Exs. 15-17).

22 **ii. Defendant Sold RTJ Apparel to Another Discount Store, TJ Maxx**

23 Contrary to what Defendant would lead the Court to believe, Defendant has sold apparel
 24 with RTJ Marks to one of the nation’s leading discount stores, TJ Maxx. There is no mention
 25

1 that Defendant ceased sales to this entity and, in fact, Defendant continued to sell to this entity,
 2 based on evidence provided in August, through at least April 2007. (Zetlmeisl Supp. ¶ 7).
 3 Moreover, the Graveel Declaration describes a prior communication between Graveel and
 4 RTJ2 regarding the sale of RTJ apparel to discounters, including “off-price” stores, such as TJ
 5 Maxx, Stein Mart and Sym’s Corporation. (Graveel ¶ 9). Graveel later states “to accommodate
 6 RTJ2’s request, we ceased selling to these alleged ‘discount stores’ when RTJ2 raised
 7 concerns.” (*Id.*). Noticeably absent from the exhibit supporting Graveel’s declaration and
 8 Defendant’s brief is any mention of sales made to TJ Maxx, despite Graveel’s grouping of TJ
 9 Maxx with other discount stores. (*Id.*, Ex. A).

11 **iii. Defendant has Recent Sales through Defendant’s Own Outlet Store**

12 In late August 2007, Messrs. Zetlmeisl & Burgett visited Defendant’s Outlet Store in
 13 Lenexa, Kansas, as part of Plaintiffs’ financial review of Defendant. (Zetlmeisl Supp. ¶ 3;
 14 Burgett Supp. ¶ 3). As viewed by Messrs. Zetlmeisl & Burgett, Defendant’s Outlet store offers
 15 for sale apparel bearing the RTJ marks at discount prices. (*Id.*). Defendant’s own financial
 16 documents identify sales to this entity and classify it as a “Secondary Market.” (Zetlmeisl Supp.
 17 ¶ 4). Therefore, Defendant is selling apparel with RTJ Marks to its own discount store.

18 **iv. Defendant has Recent Sales through Defendant’s Dock Sale**

19 As detailed *supra*, Defendant’s weekly Dock Sale is open to the public and employees
 20 selling RTJ branded product at discount prices. (Zetlmeisl Supp. ¶¶ 5-6; Burgett Supp. ¶ 4-5).

21 **C. Plaintiffs’ Request for Injunctive Relief is Not Moot and Defendant Merely Confirms
 22 that It Will Not Be Injured by Entry of the Preliminary Injunction**

23 Defendant’s opposition brief is the first time Plaintiffs were informed that any
 24 infringing conduct was allegedly ceased. (Jones Supp. ¶ 6). During the June and July
 25 exchanges between the parties, Defendant never mentioned it ceased sales to any discount
 stores. (*Id.*). Defendant never told Messrs. Zetlmeisl & Burgett that it ceased sales to discount

1 stores during the financial review in late August. (Burgett Supp. ¶ 7; Zetlmeisl Supp. ¶ 9). Yet
 2 Defendant (on the basis of no admissible evidence) now suggests that this motion is moot
 3 because it ceased sales to discount stores. The suggestion would be without merit even if it
 4 were accurate, which it is not. *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415,
 5 1422-23 (9th Cir. 1984) (affirming preliminary injunction where the defendant “voluntarily
 6 stopped using the disputed term”). To support its position, Defendant relies upon the court’s
 7 decision in *Nissan Motor Co. v. Nissan Computer Corp.*, No. 99-12980, 2007 U.S. Dist. LEXIS
 8 90487, *59 (C.D. Cal. Sept. 21, 2007), where the court denied a permanent injunction because
 9 defendant ceased the infringing conduct nearly eight years ago. *Id.* Unlike the situation in
 10 *Nissan*, Defendant’s conduct is recent and ongoing. Moreover, even if Defendant’s assertion is
 11 correct, it will merely affirm that Defendant will not suffer any harm by the entry of the
 12 preliminary injunction.

14 **D. Plaintiffs Need Not Introduce Evidence that Defendant is Likely to Infringe Again**

15 The Ninth Circuit does not require Plaintiffs “also to introduce concrete evidence that
 16 the defendants are likely to infringe again.” *Polo Fashions*, 793 F.2d at 1135-36. The Supreme
 17 Court stated long ago in *William R. Warner & Co v. Eli Lilly & Co.*, 265 U.S. 526, 532 (1924)
 18 “a trademark plaintiff ‘entitled to relief, is entitled to effective relief; and any doubt in respect
 19 of the extent thereof must be resolved in its favor as the innocent producer and against the
 20 [defendant], which has shown by its conduct that it is not to be trusted.’” Similarly, the
 21 Northern District of California in *E. & J. Gallo Winery v. Consorzio Del Gall Nero*, 782
 22 F.Supp. 457, 468 (N.D. Cal. 1991) enjoined the defendant even after it voluntarily discontinued
 23 use of the mark because defendant’s “past conduct does not reasonably ensure continued
 24 adherence to its present position.” *Id.* at 468-471. The court concluded that “even if the Court

1 does [defendant] a disservice in reaching this conclusion, issuance of the injunction will not
 2 likewise do [defendant] any harm.” *Id.* While Plaintiffs are under no obligation to prove that
 3 violative conduct will certainly continue to occur, they have sufficiently established, through
 4 this motion, that Defendant’s conduct and statements do not “reasonably ensure continued
 5 adherence.”

6 **E. Even if Accepted, Defendant’s Evidence Contains Fatal Evidentiary Deficiencies**

7 The only evidentiary submission Defendant offers in opposition to Plaintiffs’ motion is
 8 the self-serving declaration of its president, Larry Graveel (“Graveel Declaration”). Attached
 9 to the Graveel Declaration is a single six page exhibit (“Graveel Exhibit”) apparently
 10 comprising material drawn from other documents which Mr. Graveel (without foundation or
 11 authentication) claims evidence the extent of sales to only six of Defendant’s customers. As a
 12 matter of law, neither the Graveel Declaration, nor six page Graveel Exhibit are effective even
 13 to put in issue, let alone overcome, Plaintiffs’ evidence.

14 **1. The Graveel Exhibit is Inadmissible**

15 Graveel declares that he has “reviewed the sales data for GFSI’s distribution of RTJ
 16 apparel to the retailers listed in the supporting papers filed by RTJ2. Spreadsheets that
 17 accurately show that data are attached to this Declaration as Exhibit A.” (Graveel ¶ 11).
 18 Graveel **does not declare** that documents in the Graveel Exhibit are documents kept in the
 19 ordinary course of business (as opposed, for example, to having been prepared specifically for
 20 this motion), and Graveel **does not** declare that he is the custodian either of the “sales data” he
 21 refers to, or of the documents comprising the Graveel Exhibit. Nor does Graveel explain how,
 22 when, by whom, or for what purpose the Graveel Exhibit was created. The data compilation of
 23 a business entity is inadmissible hearsay unless it meets the requirements of Fed. R. Evid.
 24

1 803(6), governing the admission of “records of a regularly conducted activity.”¹ Merely
 2 proffering material that looks like a “business record,” or a summary compiled from a business
 3 record, does not avoid the preliminary requirement that a party authenticate the documents it
 4 seeks to admit. Therefore, the Graveel Declaration in authenticating such material must specify
 5 the basis for his knowledge of record-keeping practices, must demonstrate that the material
 6 meets the “time of making” requirement of Rule 803(6), and must clearly state that the records
 7 were made by regularly conducted activity as a matter of regular practice. *See Rambus, Inc. v.*
 8 *Infineon Techs. Ag*, 348 F.Supp.2d 698 (E.D. Va. 2004) (analyzing the submitted declarations
 9 under Fed. R. Evid. 803(6)). The Graveel Declaration does not even attempt to establish these
 10 foundational requisites. Nor can the Graveel Exhibit come in as a summary under Fed. R.
 11 Evid. 1006. Before summaries are admissible, there must be an adequate showing the source
 12 material is, itself, admissible. *See Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259-60
 13 (9th Cir. 1984).

14 An identical evidentiary issue was presented in a summary judgment proceeding in
 15 *Tradax Energy, Inc. v. Cedar Petrochemicals, Inc.*, 317 F.Supp.2d 373, 378-79 (S.D.N.Y.
 16 2004). Tradax attempted to establish its damages in documents attached to the declaration of
 17 its president, but the court refused to admit the documents as potentially unreliable because
 18 “[The president’s] affidavit merely identifies the relevant documents, without explaining
 19 whether they were kept in the ordinary course of business; there is no other affidavit from a
 20 document custodian.” *Id.* Who prepared the Graveel Exhibit? From what material was it
 21 drawn? When? Was either the Graveel Exhibit or the material (if any) from which it was
 22 drawn kept in the ordinary course of Defendant’s business? Defendant adduces no evidence on
 23 these issues.

24
 25 ¹ Graveel also offers second hand (alleged) statements of unnamed “Corporate representatives at Neiman Marcus
 LC” that also amount to inadmissible hearsay. (Graveel ¶ 13).

1 **2. Graveel's Conclusory, Unsupported, Self-Serving Declaration is Insufficient**

2 Mr. Graveel is the President of Defendant, GFSI. (Graveel ¶ 2). He is not, however,
 3 the GFSI manager in charge of brand management, product development, or sales of RTJ
 4 apparel. Those individuals are Ms. Angela Resch, Mr. Tim Conlin, and Mr. Jim Malseed,
 5 respectively. (Jones Ex. J). The Graveel Declaration offers no information as to how he comes
 6 to know any of the factual conclusions he sets forth in his declaration. Other than stating that
 7 he is the "president" and that he has "reviewed the sales data" (with no specificity or
 8 particularization as what that "sales data" is), Graveel makes no attempt to lay a foundation for
 9 his statements. (Graveel ¶¶ 2 & 11). His representations are hearsay. They are offered for the
 10 proof of the matter stated. He neither produces nor describes with any particularity the material
 11 he allegedly reviewed nor does he explain how that material (whatever it is) leads him to the
 12 conclusions sworn to. As a result, the inconsistent, self-serving and conclusory Graveel
 13 Declaration is without foundation and, therefore, insufficient to refute Plaintiffs' support.

14 Even if the Graveel Exhibit were admissible (which it is not), it would contradict the
 15 sworn statements of Mr. Graveel, and suggest a lack of reliability not only of the Graveel
 16 Exhibit, but of the Graveel Declaration itself. Mr. Graveel states that *after* "discussions with
 17 RTJ2 in the summer of 2007," GFSI, "to accommodate" RTJ2's concern that GFSI was selling
 18 RTJ branded product to discount stores, "ceased selling to these alleged 'discount stores.'"
 19 (Graveel ¶ 9). But the proffered Graveel Exhibit suggests that there were no sales to Stein Mart
 20 or Neiman Marcus post-September 2006, and no sales to Syms Corp. post-October 2006.
 21 (Graveel ¶¶ 12-14, Ex. A). Yet, Mr. Graveel swears that such sales ceased as an
 22 accommodation to RTJ2 later than the summer 2007. (Graveel ¶ 9). That cannot be true. And
 23 of course, even if Defendant has stopped selling to some discount stores, as discussed above, it
 24 has avoided discussing, or has mischaracterized, its other discounted sales, which Defendant
 25 either does not mention (TJ Maxx), or claims are not discount stores (The Golf Warehouse).

1 **F. Defendant Will Apparently Suffer No Harm Upon Entry of Preliminary Injunction**

2 The Ninth Circuit stated “[I]f the defendants sincerely intend not to infringe, the
 3 injunction harms them little; if they do, it gives [Plaintiff] substantial protection of its
 4 trademark.” *Polo Fashions*, 793 F.2d at 1135-36. Thus, if Defendant’s claim to have ceased
 5 sales to discount stores, except The Golf Warehouse, is credited, it will suffer no substantial
 6 harm upon entry of the injunction. Any alleged harm to Defendant is limited to its sales to
 7 TGW and is purely economic in nature. Plaintiffs do not object to the posting of a reasonable
 8 bond and will do so should the Court find it necessary or appropriate; but any such bond should
 9 be limited in light of Defendant’s contention that the only discount store it is selling to is TGW.

10 **CONCLUSION**

11 Defendant’s opposition supports the fact that Plaintiffs have both a high probability of
 12 success on the merits and serious likelihood of irreparable injury. Defendant effectively admits
 13 it is selling outside the License granted by the License Agreement – and it asserts a right to
 14 continue so doing. For the reasons set forth above, as well as the reasons set forth in Plaintiffs’
 15 initial submissions, it is respectfully urged that the Court grant this motion and preliminarily
 16 enjoin Defendants in accordance with the Proposed Order offered by Plaintiffs.

17 Respectfully submitted,

18 Dated: _____

19 _____
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